

State of Colorado

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Meeting Minutes October 17, 2006

The State Personnel Board met in public session on Tuesday, October 17, 2006, at the Colorado State Personnel Board, 633 17th Street, Suite 1400, Courtroom 1, Denver, Colorado 80202-3604.

The meeting was called to order at approximately 9:00 a.m. Board Members Rich Djokic, Donald J. Mares, and John Zakhem were present in person. Board Member Diedra Garcia arrived at approximately 9:10 a.m.

Kristin F. Rozansky, Board Director; Assistant Attorney General Pam Sanchez, Board Counsel; and Jane Sprague, General Professional III, were also present in person.

The Department of Personnel and Administration's (DPA) Division of Human Resources (DHR) is currently preparing a series of recommendations to handle any impact from a pandemic flu upon state operations. These recommendations will include proposed changes to State Personnel Board rules. To prepare the Board for reviewing those recommendations, DHR arranged for Dr. Lisa Miller, Director, Division of Disease Control & Environmental Epidemiology, Department of Public Health & Environment, to give a presentation to the Board on Influenza, Avian Influenza and Pandemic Influenza. Dr. Miller provided a history of the three pandemics in the last century. She also explained that the current bird flu virus is characterized by transmittal from farm-to-farm; survival over long periods in the environment; spread from Asia into Russia, Europe, and Africa; wiping out of domestic poultry; and infecting of approximately 250 humans since 2003, starting in Vietnam and Indonesia, more than half of whom have died of the disease.

Issues which would arise in the case of a pandemic flu outbreak include the necessity for isolation, quarantine, and social distancing, should bird flu become a pandemic, and critical disruption of the infrastructure. Concerns regarding bird flu include the fact that antiviral supplies are insufficient, and the system has no capacity to handle the "surge effect" of such a flu.

I. REQUESTS FOR RESIDENCY WAIVERS

A. October 1, 2006 Report on Residency Waivers

Director Rozansky reported that a supplemental request for information had been sent to the Department of Personnel and Administration regarding its residency waiver request. She is reviewing the supplemental information recently submitted by the Department of Corrections regarding its residency waiver request. The residency waiver request for the Department of Human Services for a Nursing Home Administrator at Fitzsimons has been granted.

II. PENDING MATTERS

A. Department of Public Safety, Colorado State Patrol Intern, State Personnel Board case number 2007R003; Request for Residency Waiver.

Pursuant to a request by the Board in September to review the above-referenced residency waiver request, Marshall Norman, Director of HR, Department of Public Safety (DPS), and Sergeant Sean Wheeler addressed the Board regarding the need for out-of-state recruiting for the State Patrol Intern position. Mr. Norman discussed the facts that there is competition among other law enforcement agencies, including salary and bonuses being offered by some Colorado cities, and that there are many troopers retiring but DPS cannot get enough qualified applicants to replace those retiring. Sgt. Wheeler discussed recruiting efforts, including advertisements in local newspapers, the employer referral program, recruiting among military personnel at Fort Carson and Peterson Air Force Base, advertising in Washington, D.C. and the southeastern states, and recruiting among women's sports teams and colleges. The Board took no further action on this residency waiver request.

III. REVIEW OF INITIAL DECISIONS OR OTHER FINAL ORDERS OF THE ADMINISTRATIVE LAW JUDGES ON APPEAL TO THE STATE PERSONNEL BOARD

A. Timothy Bennett v. Department of Corrections, State Personnel Board case number 2003B150(C).

After discussion, Mr. Mares moved, in two motions, that the Findings of Fact of the Amended Initial Decision, as modified by the Order Re: Proposed Modifications or Clarifications of Amended Initial Decision of the Administrative Law Judge, and the Conclusions of Law of the Amended Initial Decision be adopted. In addition, he moved that the remedy awarded to Complainant, with regards to the abolishment of his position, as set forth in the Order Re: Proposed Modifications or Clarifications of Amended Initial Decision of the Administrative Law Judge, paragraph 4,

be adopted. Ms. Garcia seconded the motions. The motions passed on the affirmative vote of the following Board members: Ms. Garcia, Mr. Mares, and Mr. Zakhem. Mr. Djokic abstained, as he was recused from participation in this matter.

Mr. Mares also moved that this matter be remanded to the Administrative Law Judge to hold an evidentiary hearing on two issues. The first issue is the amount of attorney fees to be awarded to Complainant for litigating the abolishment of his position. The second issue is the appropriate amount of the pay reduction in Complainant's base pay imposed as a result of the August 8, 2003 disciplinary action. The Board rejects the Administrative Law Judge's modification of the Respondent's imposition of a permanent monthly \$300 reduction of the Complainant's base salary. The Board determines that the ALJ's modification of the permanent \$300 reduction to a temporary reduction of \$1800 total over a six-month period is not sufficient given the record before the Board. The Board also finds that the permanent reduction on Complainant's base pay as imposed by Respondent was excessive given the record before the Board. The Administrative Law Judge is to make written findings of fact and enter an order regarding the monetary award as to the two issues outlined above. Mr. Zakhem seconded the motion. The motion passed on the affirmative vote of the following Board members: Ms. Garcia, Mr. Mares, and Mr. Zakhem. Mr. Djokic abstained, as he was recused from participation in this matter.

IV. REVIEW OF PRELIMINARY RECOMMENDATIONS OF THE ADMINISTRATIVE LAW JUDGES TO GRANT OR DENY PETITIONS FOR HEARING

- A. Sharon Carbaugh v. Board of Trustees for the University of Northern Colorado, State Personnel Board case number 2007G008.

Mr. Mares moved to adopt the Preliminary Recommendation of the Administrative Law Judge and deny the petition for hearing. Mr. Djokic seconded the motion. The motion passed on the affirmative vote of the following Board members: Mr. Djokic, Mr. Mares, and Mr. Zakhem. Ms. Garcia did not vote, as she was absent for this portion of the meeting.

- B. James Thomas v. Department of Human Services, Disability Determination Services, State Personnel Board case number 2006G007.

Mr. Djokic moved to adopt the Preliminary Recommendation of the Administrative Law Judge and deny the petition for hearing. Mr. Mares seconded the motion. The motion passed on the affirmative vote of the following Board members: Mr. Djokic, Mr. Mares, and Mr. Zakhem. Ms. Garcia did not vote, as she was absent for this portion of the meeting.

V. INITIAL DECISIONS OR OTHER FINAL ORDERS OF THE ADMINISTRATIVE LAW JUDGES

- A. Cynthia Hernandez v. Department of Revenue, State Personnel Board case number 2006G047 (September 27, 2006).

VI. REVIEW OF THE MINUTES FROM THE SEPTEMBER 19, 2006 PUBLIC MEETING OF THE STATE PERSONNEL BOARD

Mr. Djokic moved to approve the minutes of the September 19, 2006 meeting as submitted. Mr. Zakhem seconded the motion. The motion passed on the affirmative vote of the following Board members: Mr. Djokic, Mr. Mares, and Mr. Zakhem. Ms. Garcia did not vote, as she was absent for this portion of the meeting.

VII. ACKNOWLEDGMENTS

DECISIONS OF THE STATE PERSONNEL BOARD MADE AT ITS SEPTEMBER 19, 2006 PUBLIC MEETING:

- A. Darlena J. Clements v. Department of Regulatory Agencies, Division of Insurance, State Personnel Board case number 2007G001.

The Board voted to adopt the Preliminary Recommendation of the Administrative Law Judge and to deny the petition for hearing.

- B. Robert W. Murray v. Department of Corrections, State Personnel Board case number 2006G073.

The Board voted to adopt the Preliminary Recommendation of the Administrative Law Judge and to deny the petition for hearing.

- C. Jeff Hotchkiss v. Department of Corrections, State Personnel Board case number 2007G003.

The Board voted to adopt the Preliminary Recommendation of the Administrative Law Judge and to deny the petition for hearing.

VIII. REPORT OF THE STATE PERSONNEL DIRECTOR

David Kaye, Director, DHR/DPA, reported to the Board that DHR is in the process of getting stakeholder input on the proposed performance plan so it can present a unified plan to fix performance pay. There is rulemaking contemplated by the Personnel Director to: (1) "pull the plug on the multiple vacancy rule," first via emergency rulemaking and then permanent rulemaking, which will return the rule to an earlier iteration; and (2) permit or allow departments to use saved pay in layoffs within a retention area.

IX. ADMINISTRATIVE MATTERS & COMMENTS

A. ADMINISTRATIVE MATTERS

- Cases on Appeal to the Board and to Appellate Courts

B. OTHER BOARD BUSINESS

- Staff Activities

In addition to the above, Director Rozansky stated that staff has been working on finalizing the Business Plan and that the Board will travel to Golden to the Colorado Department of Public Safety, Colorado State Patrol, for its November 21, 2006 meeting, where there will be a tour of the academy and a 15-minute driving course. The Director noted that, due to technical difficulties, there will no teleconferencing of the meeting from Denver.

C. GENERAL COMMENTS FROM ATTORNEYS, EMPLOYEE ORGANIZATIONS, PERSONNEL ADMINISTRATORS, AND THE PUBLIC

X. PROPOSED LEGISLATION AND/OR RULEMAKING

The Board's Notice of Rulemaking was issued on August 18, 2006, and published in the Colorado Register on September 10, 2006. The proposed rules and the proposed statement of basis and purpose have been available for review at the Board office as well as on the Internet since September 11, 2006. Testimony and comments regarding proposed amendments to the Board Rules were taken at this meeting. (See below.) The public testimony and comment portion of the rulemaking hearing was then closed. The purpose of the Rulemaking on October 17, 2006, is to adopt amendments to Board Rules 1-5, 1-67, 2-13, 6-15, 8-19, 8-23, 8-25, 8-26, 8-27, 8-28, 8-29, 8-30, 8-43, 8-50(C), 8-50(D), 8-53(B), and 8-64(C). These rules are proposed for the general clarification for the public and efficient management of the Board.

Following Mr. Zakhem's introduction, the comment portion of the rulemaking hearing was commenced. Written comments and testimony were provided by David Kaye, Director, DHR/DPA, and Teresa Zoltanski, Colorado Federation of Public Employees (CFPE). In addition, Marshall Norman, HR/DPS, made comments on some of the rule changes. Mr. Zakhem then closed the comment portion of the rulemaking hearing. Ms. Garcia moved to adopt the proposed language, with the modifications (in quotes below) set forth during deliberation, as permanent amendments to the rules, and the accompanying statement of basis and purpose, as follows:

Board Rule	Subject
1-5	Changing the requirement from eight copies of all materials to nine copies of all materials;
1-67	Changing the definition of Retirement to include all state retirement plans;
2-13	Changing the citation to rule from 1-19B to Board Rule 1-19;
6-15	Changing the requirements for a written notice of disciplinary action to include the time frame for an appeal of the disciplinary action, and the Board's address, telephone and facsimile numbers for filing the appeal, and adding, "to the employee's last known address";
8-19	Changing the citation to rule from 8-18B to Board Rule 8-18;
8-23	Amending the requirement that the agency submit an original and one copy of its response to the Whistleblower complaint;
8-25	Deleting the rule in its entirety to conform to statute by deleting the procedure relating to referral to the Personnel Director for investigation of the allegations of Whistleblower violations;
8-26	Deleting the rule in its entirety to conform to statute by deleting the procedure relating to referral to the Personnel Director for investigation of the allegations of Whistleblower violations;
8-27	Amending the rule to include the time line for a hearing, and changing "was" to "is" in the first sentence;
8-28	Deleting the portion of the rule referring to the outcome of any Whistleblower investigation;
8-29	Deleting the rule in its entirety to conform to statute by deleting the procedure relating to referral to the Personnel Director for investigation of the allegations of Whistleblower violations;
8-30	Amending the reference to appeal to clarify the inclusion of appeals of selection decisions, by adding, "Pursuant to §24-50-125.3, the Board has jurisdiction over claims of discrimination within the state personnel system," and changing the second sentence to read, "receipt of any final written decision (including, but not limited to, grievance decisions, selection decisions, or performance pay system dispute resolution decisions).
8-43	Deleting the reference to Director's website from the rule and adding, "Board" to the name of the State Personnel Board's appeal/dispute form;
8-50(C)	Deleting the reference to Whistleblower investigations;
8-50(D)	Deleting the reference to Whistleblower investigations;
8-53(B)	Changing the citation to rule from 6-10B to "Board Rule" 6-10;
8-64(C)	Changing the citation to rule from Rule 8-39 to Board Rule 8-39.

The specific authority of the State Personnel Board to promulgate these rules is found at Article XII, sections 13 and 14 of the Colorado Constitution; the State Personnel System Act, section 24-50-101, *et seq.*, C.R.S.; section 24-50.5-101, *et seq.*, C.R.S.; and section 24-4-103, C.R.S.

The purpose for adopting and revising these rules, attached to these Minutes as Exhibit A, is:

- The record of the rule making proceeding demonstrates the need for the rules.
- The proper statutory authority exists for the rules.
- To the extent practicable, the rules are clearly and simply stated so that their meaning will be understood by any party required to comply with the rules.
- The rules do not conflict with other provisions of the law. The duplication or overlapping of the rules, if any, has been explained by the Board.

Mr. Mares seconded the motion. The motion passed on the affirmative vote of the following Board members: Mr. Djokic, Ms. Garcia, Mr. Mares, and Mr. Zakhem.

XI. EXECUTIVE SESSION

- A. Case Status Report
- B. Minutes of the September 19, 2006 Executive Session
- C. Other Business

XII. BUSINESS PLAN

The meeting adjourned by consensus.

* * * * *

APPROVED THIS 21st DAY OF NOVEMBER, 2006.

John Zakhem, Chair

Rich Djokic, Member

Diedra Garcia, Member

Donald J. Mares, Member

EXHIBIT A

AMENDMENTS TO RULES FOR OCTOBER 17, 2006 RULEMAKING

Board Rule 1-5. Unless otherwise ordered, **all materials** to be considered by the Board at its monthly meeting must be received in the Board's office at least 12 calendar days before the meeting. The party must provide the original and nine copies of all materials to be considered by the Board, except as otherwise provided in these rules. (1/1/07)

Board Rule 1-67. Retirement. Separation of an employee from the state personnel system who is eligible to retire under the provisions of the state retirement plan in which the employee is enrolled (e.g., Public Employees' Retirement Association's defined benefit plan). (1/1/07)

Board Rule 2-13. Any employee entering or remaining in the senior executive service pay plan on or after July 1, 2003, waives retention and reemployment rights with respect to any other position in the personnel system pursuant to Board Rule 1-19, but shall have reinstatement privileges with respect to any vacant position in the employee's current or previously certified class. (1/1/07)

Board Rule 6-15. A written notice of disciplinary action must be sent to the employee's last known address, by certified mail, or may be hand-delivered to the employee. The employee must receive the notice no later than five days following the effective date of the discipline. The notice must state the specific charge, the discipline taken, and right to appeal, including the time frame for such an appeal, and the Board's address and telephone and facsimile numbers for filing the appeal. Employees may submit a written statement to be attached to disciplinary action. (1/1/07)

A. If the employee refuses to accept the notice, a dated return receipt from a mail carrier is conclusive proof of the attempt to deliver.

Board Rule 8-19. If the employee or the department contends the other party has not complied with the terms of the settlement agreement, the employee or the department may petition the Board for a hearing. If the employee does not comply with the terms of the agreement, the action may be subject to the provisions in the "Performance" chapter.

A. If the employee is no longer employed by the department and either party contends the other has not complied with the terms of a settlement agreement, the employee or the department may seek review or enforcement of the Board's order entered pursuant to Board Rule 8-18 above, under the provisions of §24-4-106, C.R.S. (1/1/07)

Board Rule 8-23. The Board will send a copy of the complaint to the department for an initial response. The response must be filed within 45 days after the date the complaint was filed with the Board. (1/1/07)

Board Rule 8-25. (Repealed, 1/1/07)

Board Rule 8-26. (Repealed, 1/1/07)

Board Rule 8-27. If an appeal is also filed asserting a constitutional or statutory right to a hearing, and the appeal and complaint relate to the same or closely related facts, they may be consolidated for evidentiary hearing. Either party may request, or the administrative law judge may order, consolidation if it would be more efficient and would not unduly prejudice any party. The hearing shall be set to commence not later than ninety days after the receipt of the written response filed by the agency and may be continued once for thirty days only upon good cause shown and upon approval of the administrative law judge. (1/1/07)

Board Rule 8-28. If the employee does not have a constitutional or statutory right to a hearing, the case will be set for preliminary review pursuant to the discretionary Board hearing section of these rules. (1/1/07)

Board Rule 8-29. (Repealed, 1/1/07)

Board Rule 8-30. Pursuant to §24-50-125.3, C.R.S., the Board has jurisdiction over claims of discrimination within the state personnel system. If an employee or applicant seeks to have an allegation of discrimination reviewed by the Board, that person must file a petition for hearing within 10 days of the action or receipt of any final written decision (including, but not limited to, grievance decisions, selection decisions, or performance pay system dispute resolution decisions). All such decisions must notify that employee or applicant of the right to appeal the final decision, including the time frame for such an appeal, and the Board's address and telephone and facsimile numbers for filing the appeal. Except for appeals, the Board will defer action to allow the parties a chance to resolve the issue. (1/1/07)

Board Rule 8-43. The appeal must be in writing and copies provided concurrently to the affected department. Use of the standard "**Colorado State Personnel Board Consolidated Appeal/Dispute Form**" found on the Board website is required. For good cause shown, the Board may waive this requirement provided the person filing the appeal ("complainant") sets forth such grounds at the time the appeal is submitted. The appeal must clearly state the following in sufficient detail. (1/1/07)

1. The name, address, and telephone number of the complainant and any representative.
2. The specific action being appealed and a copy of the written notice.

3. The date the complainant received the notice of action.
4. A short, specific statement giving the reason for the appeal.
5. Whether the complainant is a certified employee.
6. The specific remedy sought.

Failure to provide a copy to the affected department may be grounds for denial or dismissal of the appeal.

Board Rule 8-50. Each party is required to file an information sheet containing the following specifically and clearly stated information:

A. Complainant

1. the facts complainant is prepared to prove, if a hearing is granted, that the respondent's actions were arbitrary, capricious, or contrary to rule or law;
2. any legal argument or authority complainant relies upon to support his or her claims;
3. the names, addresses, and telephone numbers of all witnesses, and a brief description of the testimony of each such witness that would substantiate complainant's allegations and claims;
4. a list of exhibits that would substantiate complainant's allegations and claims, with copies of such exhibits attached to the information sheet; and
5. a description of the remedy or relief sought by complainant.

B. Respondent

1. the response to the allegations and claims of complainant, including all facts respondent intends to prove if a hearing is granted that respondent's actions were not arbitrary, capricious, or contrary to rule or law;
2. any legal arguments or authority relied on by respondent;
3. the names, addresses, and telephone numbers of all witnesses, and a brief description of testimony of each such witness that would substantiate respondent's allegation and claims;
4. a list of exhibits that would substantiate respondent's allegations and claims, with copies of such exhibits attached to the information sheet; and
5. the respondent's response to the remedy or relief sought by complainant.

C. Unless an investigation has been referred and is pending as provided in the allegation of discrimination section of this chapter, complainant and respondent shall file their respective information sheets with the Board and serve a copy on the other party within 25 days of receipt of the petition for

hearing by the Board. The Board may grant one extension of time to each party for the filing of information sheets. Such extension shall be for no more than five (5) days, and granted only upon good cause shown. (1/1/07)

- D. In the event an investigation has been referred and is pending pursuant to the allegation of discrimination section of this chapter, the time periods to file information sheets as provided in this rule shall not commence until the final written report or opinion resulting from such investigation is served upon the parties by the Board. (1/1/07)
- E. The parties shall be required to file their respective information sheets with the Board electronically either on disk or CD-ROM, and to also submit a paper copy of the information sheet, with attached exhibits. The Board, for good cause, may waive the requirement of an electronically-filed information sheet if the party, no later than five days prior to the time the information sheet is due, makes a written request to the Board with detailed grounds to support the request.
- F. If complainant fails to file a conforming information sheet, the petition for hearing may be considered abandoned and dismissed. If the respondent fails to file an information sheet, the preliminary recommendation will be based solely upon the information submitted by complainant.
- G. The Board's director or administrative law judge will review the information presented by the parties in their information sheets to determine whether valid issues exist which merit a hearing. Complainant has the burden of demonstrating the existence of valid issues which merit a hearing by showing that there is an evidentiary and legal basis that would support a finding that the action was arbitrary, capricious, or contrary to rule or law, and that the relief requested by complainant is within the Board's statutory authority.
- H. An administrative law judge or the Board's director will make a written preliminary recommendation to the Board, with copies provided to both parties, as to whether a hearing should be granted or denied.
- I. At any stage in the preliminary review process, the Board's director or administrative law judge may request the parties to participate in a mediation conference with a trained mediator.

Board Rule 8-53. Any action that adversely affects a certified employee's current base pay, status, or tenure as defined by Board rule may be appealed and will be set for hearing. An adverse effect results in a reduction of current base pay or loss of other rights to which an employee is entitled by law, including denial of reemployment rights or removal from a reemployment list, probable cause opinion in discrimination cases, appeals of investigative reports finding reasonable basis for retaliation for disclosure of information, dismissal for failure

to perform satisfactorily under senior executive service contracts, and reductions of salary during the term of senior executive service contracts. Issues involving annual total compensation survey, discretionary pay differentials, the granting of in-range salary movements, leave sharing, personal services contracts, job evaluation system and actions, renewals of senior executive service contracts at a reduced salary, and removal of positions from the senior executive service pay plan into the traditional classified pay plan are not subject to appeal.

- A. Disciplinary actions are subject to appeal and will be set for hearing, except discipline of probationary employees for unsatisfactory performance, reversion of trial service employees for unsatisfactory performance, and demotion of conditional employees to the class in which last certified. An employee who resigns in lieu of disciplinary action forfeits appeal rights.
- B. Employees who are separated for failure to perform under senior executive service contracts do not have a right to progressive discipline or to a Board Rule 6-10 meeting. In such an appeal, the appointing authority must produce evidence that the employee's performance was not satisfactory. The employee shall then have the burden of producing evidence that performance was satisfactory, and shall bear the burden of proof that the appointing authority's decision was arbitrary, capricious, or contrary to rule or law. (1/1/07)

Board Rule 8-64. Upon oral or written request of a party or counsel for a party no later than 10 days prior to a hearing or deposition, the Board's director or administrative law judge shall issue a subpoena or subpoena duces tecum requiring the attendance of a witness or the production of documentary evidence, or both, at such deposition or hearing.

- A. The subpoena or subpoena duces tecum shall be served on the witness to whom it is directed in the same manner as subpoenas served in proceeding in the district courts for the State of Colorado pursuant to C.R.C.P. 45. In addition, the subpoena or subpoena duces tecum must be served at least 48 hours prior to the commencement of the deposition or hearing.
- B. Except for witnesses subpoenaed on behalf of the State of Colorado, or an officer or department of the State of Colorado, witnesses subpoenaed pursuant to this rule shall be paid the same fees for attendance and mileage as are paid to witnesses in the district courts of the State of Colorado. The party requesting that the subpoena be issued shall pay such fees to the witness at the time the subpoena is served as required by this rule.

- C. Upon the failure of a party or counsel to comply with the requirements of either subparagraphs A or B of this rule, the party or witness subject to the subpoena may petition the Board's director or the administrative law judge for an order quashing such subpoena. The Board's director or the administrative law judge, in his or her discretion, may also award attorney fees for such non-compliance pursuant to Board Rule 8-39. (1/1/07)
- D. Upon failure or refusal of any witness to comply with a subpoena issued and served upon them under this rule, the Board's director or administrative law judge may petition the district court for the City and County of Denver for an order citing such witness in contempt for such failure or refusal. The procedure for such contempt proceedings shall be governed pursuant to §24-4-105(5), C.R.S.